

1 HONORABLE RONALD B. LEIGHTON  
2  
3  
4  
5  
6  
7  
8  
9

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 PHYLLIS GORDON, as the Personal  
11 Representative of the estate of Anthony  
12 Gordon, and MARCOS GORDON and  
13 PHYLLIS GORDON, husband and wife,

Plaintiffs,

v.

14  
15  
16 STATE OF WASHINGTON, Department of  
17 Social & Health Services, Western State  
18 Hospital; ANDREW PHILLIPS, in his  
19 individual and official capacities; EDWARD  
20 L. KELLY, in his individual and official  
capacities; DONNA STAGLE, in her  
individual and official capacities; JOHN DOE  
& JANE DOES 1 through 20, in their  
individual and official capacities,

Defendants.

Case No. CV-09- 05069RBL  
(CONSOLIDATED)

ORDER ON DEFENDANTS' MOTION  
FOR RECONSIDERATION  
[Dkt. #40]

21  
22  
23  
24 THIS MATTER comes before the Court on Defendants' Motion for Reconsideration of Court's  
25 Order on Defendants' Motion for Summary Judgment [Dkt. #40]. Defendants ask the Court to reconsider  
26 its Order and Amended Order on Defendants' Motion for Summary Judgment [Dkts. #37 & 42], and  
27 dismiss Plaintiffs' civil rights claim because Plaintiffs have failed to present expert testimony establishing  
28

1 that Dr. Kelly's evaluation of Mr. Gordon amounted to deliberate indifference or a violation of the  
2 professional judgment standard. Defendant also asks the Court to reconsider its decision to reserve the  
3 issue of sanctions related to the alleged destruction of the ward videotape. Defendants' Motion for  
4 Reconsideration is **DENIED**. The reasons for the Court's decision are set forth below.  
5

6 **1. Civil Rights Claims Against Dr. Kelly.**

7 Defendants argue that Plaintiffs have failed to submit competent testimony establishing that Dr.  
8 Kelly was either deliberately indifferent to Mr. Gordon's serious medical need, or that his care  
9 substantially departed from the accepted professional standard. [Dkt. #40 at 3]. Defendants argue that  
10 summary judgment was improperly denied because expert testimony is required in this case, and Court  
11 neither referenced in its Order, nor based its decision on, expert testimony. *Id.* Defendants further argue  
12 that Plaintiffs' expert, RN Babette Weiland, is not qualified to testify as to the standard of care for a  
13 physician. *Id.* at 3, n. 2.

14 The issue on summary judgment was whether, viewing the facts in a light most favorable to the  
15 Plaintiffs, Dr. Kelly's medical care of Mr. Gordon amounted to a constitutional violation. As Defendants  
16 argue, a health care provider violates a pretrial detainee's constitutional rights if he is deliberately  
17 indifferent to the pretrial detainee's serious medical need. *Conn v. City of Reno*, 591 F.3d 1081, 1094-95  
18 (9<sup>th</sup> Cir. 2010). And as Plaintiffs argue, because civilly committed individuals are entitled to more  
19 considerate treatment than pretrial detainees, a health care provider violates a civilly committed  
20 individual's constitutional rights if his care "is such a substantial departure from the accepted professional  
21 judgment, practice, or standards as to demonstrate that the person responsible actually did not base the  
22 decision on such a judgment." *Youngberg v. Romeo*, 457 U.S. 307, 322, 323 (1982). The Court  
23 determined that "genuine issues of material fact exist as to whether Dr. Kelly was deliberately indifferent  
24 to Mr. Gordon's serious medical needs, or alternatively, whether his care fell below the accepted  
25 professional standard." [Dkts. #37 & 42, at 12].

1       The Court did not base denial of Defendants' motion on Nurse Weiland's testimony. Although  
2 expert testimony *may* be relevant to whether a health care provider's decision was a substantial departure  
3 from the requisite professional judgment, *see Youngberg*, 457 U.S. at 323 n. 31, Defendants have not  
4 cited, and the Court has not found, any authority indicating that expert testimony is *required* under the  
5 deliberate indifference standard. Defendants cite only to Washington case law indicating that expert  
6 testimony is necessary to establish the standard of care in an ordinary medical malpractice negligence  
7 case. [Dkt. #40 at 5, n. 2].

8           In the absence of any authority indicating that expert testimony is required to establish either the  
9 professional judgment or the deliberate indifference standards, the Court properly denied summary  
10 judgment. Without relying on expert testimony, Plaintiffs presented sufficient evidence from which a  
11 jury could conclude that Dr. Kelly was deliberately indifferent to Mr. Gordon's serious medical need, a  
12 higher standard than both the medical malpractice and the professional judgment standards.

13           To be liable for denial of medical treatment to a pretrial detainee, an official must “‘know[] of and  
14 disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from  
15 which the inference would be drawn that a substantial risk of serious harm exists, and he must also draw  
16 the inference.’ In other words, the official must demonstrate a *subjective awareness* of the risk of harm.”  
17 *Conn*, 591 F.3d at 1096 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994)). Whether an official  
18 knew of a substantial risk “is not limited to the purported recollections of the individuals involved,” but  
19 rather is “a question of fact subject to demonstration in the usual ways, including inference from  
20 circumstantial evidence.” *Farmer*, 511 U.S. at 842.

21           The Court determined that substantial evidence indicates that Mr. Gordon was a suicide risk, and  
22 inferred that Dr. Kelly should have been aware of that fact. Whether Dr. Kelly actually knew of the  
23 substantial risk of harm to Mr. Gordon is a genuine issue of material fact for the jury to resolve. This is  
24 particularly so given that “questions involving a person’s state of mind are generally factual issues

1 inappropriate for resolution by summary judgment.”” *Conn*, 591 F.3d at 1098 (quoting *Mendocino Evntl.*  
 2 *Ctr. v. Mendocino County*, 192 F.3d 1283, 1302 (9th Cir. 1994)). Because it is bound by Ninth Circuit  
 3 precedent in *Conn v. City of Reno*, this Court “must leave the question of subjective awareness to the  
 4 jury.” *Id.* Defendants’ Motion for Reconsideration on the Court’s Order denying summary judgment as  
 5 to civil rights claims against Dr. Kelly is **DENIED**.

7       **2. Sanctions Due to Alleged Spoliation of Evidence.**

8       In its Order and Amended Order on Defendants Motion for Summary Judgment, the Court  
 9 dismissed Plaintiffs’ claim for spoliation of evidence because Washington does not recognize a such a  
 10 cause of action. [Dkt. #37 at 17]. Defendants agree with that dismissal, but argue that the Court  
 11 improperly reserved the question of whether sanctions for spoliation are appropriate. [Dkt. #40 at 6].  
 12 Defendants argue that destruction of the tape is not a sanctionable event because there is no evidence that  
 13 Dr. Kelly was involved in the alleged destruction, the alleged destruction occurred before litigation began,  
 14 and the tape is no longer relevant to any issue in this case. *Id.*

16       However, at the time of the Court’s Orders, the State had never explained what happened to the  
 17 videotape,<sup>1</sup> and the video technician had not yet been deposed. *Id.* Recognizing that sanctions may be  
 18 appropriate for the alleged destruction of evidence under Fed. R. Civ. P. 73 as a civil discovery violation,  
 19 the Court reserved that question for trial. Neither Defendants nor Plaintiffs have identified any new  
 20 circumstances which would alter the Court’s disposition of this matter. Accordingly, Defendants’ Motion  
 21 /  
 22 for Reconsideration on the issue of spoliation is **DENIED**.

24       IT IS SO ORDERED.

---

27       <sup>1</sup>In its Motion for Summary Judgment [Dkt. # 27], Defendants assert that the tape was “overwritten  
 28 in the ordinary course of business, and defendants deny that this was done for any improper purpose or to  
 destroy evidence related to this case.” [Dkt. # 27 at 20]. These are not proper grounds upon which summary  
 judgment may be granted.

1 Dated this 2<sup>nd</sup> day of April, 2010.  
2  
3  
4  
5

  
Ronald B. Leighton

RONALD B. LEIGHTON  
UNITED STATES DISTRICT JUDGE

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28